164 (4)

No. 09-1255

Supreme Court, U.S.
FILED
JUN 30 2010
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

PATRICIA LIMMER, BILLYE JOYCE SMITH, AND BOBBY JEAN NOTHNAGEL,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY D/B/A UNION PACIFIC RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

REPLY BRIEF FOR PETITIONERS

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June 30, 2010

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Respondent's brief in opposition fails to rebut the following key points that support granting certiorari: (1) the lower courts have reached conflicting conclusions regarding the preemptive effect of improvements to railway crossings; (2) the question presented is a recurring and significant issue; and (3) the decision below disregarded the responsible federal agency's official interpretation of its own regulations. In fact, respondent highlights the appropriateness of granting certiorari by acknowledging that the decision below found that any "improvement[]" at railroad crossings preempts state law (Opp. i) – a sweeping holding that will abolish large swaths of state law and will apply far beyond the facts of this case.

ARGUMENT

I. A DIVISION OF AUTHORITY EXISTS IN THE LOWER COURTS

The standard for preemption adopted by the Texas Supreme Court conflicts with the standard applied by the Eighth Circuit and the highest courts of South Dakota and Louisiana. *See* Pet. 15-19. Respondent's efforts (at 22-27) to dismiss the conflicting decisions in the lower courts are unavailing.

Eighth Circuit. Respondent argues (at 22-24) that *St. Louis Southwestern Railway Co. v. Malone Freight Lines, Inc.*, 39 F.3d 864 (8th Cir. 1994), does not conflict with the decision below because, in *Malone*, the plan was to add larger lenses for flashing light signals and automatic gates, and the gates had not been completed at the time of the accident. *Malone* addressed two issues: (1) whether preemption occurred when the plan to install warning devices was approved or completed, and (2) whether the replacement of the lenses was sufficient to find preemption. The court held (1) that preemption

occurs upon completion, *see id.* at 867, and (2) that it "d[id] not believe the exchange of a single component part of the lights . . . was the installation of a warning device defined in 23 C.F.R. § 646.204(i)-(j)," *id.* This second holding was necessary to the resolution of the case, because, if the lenses themselves had been warning devices, their installation would have triggered preemption under 23 C.F.R. § 646.214(b) even if the gates had not yet been installed. Respondent offers no principled basis on which to distinguish the lenses from the tape at issue here. Thus, under the Eighth Circuit's "component of a device" approach, the decision below would have come out differently in that circuit.

South Dakota and Louisiana Supreme Courts. Respondent asserts that there is no conflict with *Boomsma v. Dakota, Minnesota & Eastern Railroad Corp.*, 651 N.W.2d 238 (S.D. 2002), and *Duncan v. Kansas City Southern Railway Co.*, 773 So. 2d 670 (La. 2000), because neither case supposedly involved "whether a federally-funded upgrade of an existing warning device constitutes an 'installation' for preemption purposes." Opp. 24-25. That is incorrect. In *Duncan*, the items in question (inventory numbers) were placed on the signs at the crossing. *See Duncan v. Kansas City Southern Ry. Co.*, 747 So. 2d 656, 667 (La. Ct. App. 1999). And, in *Boomsma*, the railroad argued that the addition of the items at issue (rubberized mats) occurred as part of an "upgrade" of the crossing. 651 N.W.2d at 243. Both courts rejected the notion, which the court below accepted in this case, that any "upgrade" of or "improvement" at a crossing constitutes the "install[ation]" of a "warning device" within the

meaning of § 646.214(b)(4). *See Duncan*, 773 So. 2d at 680; *Boomsma*, 651 N.W.2d at 244.

In any event, respondent's attempt (at 25) to draw a distinction between improvements to a crossing and improvements to a warning device at a crossing lacks support even in respondent's own articulation of the issue. Respondent frames the question presented as whether "federally-funded improvements *at a railroad crossing* pre-empt a state tort law claim." Opp. i (emphasis added). That formulation leaves no doubt that this case presents a stark choice between two lines of authority: cases such as *Malone*, *Boomsma*, and *Duncan*, which faithfully interpret the text of the regulations and this Court's cases to preempt state law only when a warning device is installed at the crossing, and the decision below, which held that any federally funded improvement at a crossing triggers preemption.

Texas Federal Courts. Respondent's attempts (at 25-27) to dismiss the federal district court decisions that squarely conflict with the decision below on the preemptive effect of Texas's 1989 program fail to dispel the lower courts' confusion on the proper standard for preemption in this context.

As to *Lesly v. Union Pacific Railroad Co.*, No. H-03-0772, 2004 U.S. Dist. LEXIS 23018 (S.D. Tex. June 25, 2004), respondent claims (at 26) the court was "vague" and stated only in "*dicta*" that the evidence presented did not support summary judgment on the issue of preemption. But respondent ignores the court's specific conclusion, as a matter of law, that retroreflective tape, "in and of itself, is not a 'warning device' as defined by" the *Manual on Uniform Traffic Control Devices for Streets and Highways* ("Manual"). 2004 U.S. Dist. LEXIS 23018, at *12. Further, the

Lesly court did not, as respondent suggests, reserve the preemption issue for consideration at trial. Instead, it ruled that "Union Pacific cannot rely on the doctrine of preemption in this action." *Id.* As respondent notes, the *Lesly* court also indicated that it was "unclear" whether federal funds had been used to apply retroreflective tape to the crossing in question. *Id.* But that identification of uncertainty in the record would not have justified barring the preemption defense. The only sufficient basis for that outcome was the court's unequivocal conclusion that retroreflective tape, "in and of itself, is not a 'warning device' as defined by" the Manual. *Id.*

Respondent seeks (at 26) to dismiss *Enriquez v. Union Pacific Railroad Co.*, No. 5:03-CV-174, 2004 U.S. Dist. LEXIS 28989 (E.D. Tex. Dec. 30, 2004), as "contain[ing] little independent analysis" and blindly following *Lesly*. That mischaracterizes the decision. The *Enriquez* court not only considered *Lesly* to be persuasive authority but also independently articulated its reasoning in concluding that retroreflective tape is not a warning device: "In the same sense that the pole of a crossbuck sign is not a passive warning device, the tape, without more, is not a passive warning device." *Id.* at *45.

Respondent notes that *McDaniel v. Southern Pacific Transportation*, 932 F. Supp. 163 (N.D. Tex. 1995), reached a contrary result. Respondent's suggestion (at 27) that federal district courts in Texas likely will follow the "published" opinion in *McDaniel* ignores that no court has done so since 1995 and that two courts (*Lesly* and *Enriquez*) in fact have reached the opposite conclusion. In any event, *McDaniel* further demonstrates the confusion in the lower courts on the appropriate standard for determining preemption

under *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344 (2000).

II. THIS CASE IS IMPORTANT

Respondent attempts (at 27-28) to show briefly at the very end of its brief that the decision below resolved only a "narrow, fact-bound question of whether retroreflective tape added to crossbucks pursuant to the 1989 Program triggers preemption" under *Easterwood* and *Shanklin*. But respondent's effort lacks credibility. Throughout its brief in opposition, respondent trumpets the breadth of the decision below. In re-stating the question presented, respondent proclaims that the Texas Supreme Court "h[e]ld that *federally-funded improvements at a railroad crossing*" suffice to establish preemption. Opp. i. The next 26-and-a-half pages of the brief in opposition further reinforce respondent's embrace of the sweeping nature of the Texas Supreme Court's holding – a holding that respondent undoubtedly hopes to use to its advantage in future litigation arising in a variety of factual circumstances.[1]

Respondent's suggestion that the question presented does not warrant certiorari because this Court already has considered the preemptive effect of the regulatory scheme at issue in *Easterwood* and *Shank-*

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[1] *See, e.g.*, Opp. 1 ("[T]he application of the tape to a sign effectively 'installs' a new and upgraded sign."), 11 (stating that the court below held "that the 'enhancement or maintenance of an existing sign to meet FHWA requirements' using federal funds constitutes federal 'approval of "the type of warning device to be installed" within the meaning of subsection (b) of the Grade Crossing Design regulations,' and therefore pre-empts any state law theory that would require additional or inconsistent warning devices") (quoting Pet. App. 19a-20a).

lin also lacks merit. Those cases addressed whether preemption follows when § 646.214(b) applies. But the issue here is *whether* § 646.214(b) even applies. The proper scope of that regulation – a question on which *Easterwood* and *Shanklin* provided little guidance – has divided the lower courts. This Court regularly grants review to clarify confusion in the interpretation of broad principles set forth in its prior decisions.[2] Moreover, notwithstanding *Easterwood* and *Shanklin*, the preemptive effect of § 646.214(b) in suits arising from accidents at railway crossings continues to be a frequently recurring issue warranting this Court's intervention.

Respondent also argues that the question presented is of diminishing importance in light of a 2004 Texas program to upgrade crossbucks at passive crossings with new crossbucks. But, even assuming that respondent's extra-record information about the 2004 Texas program is accurate, this case is about much more than the preemptive effect of the application of retroreflective tape on crossbucks in Texas. Under the decision below, as respondent reads it, essentially any improvement at a railway crossing constitutes the installation of a warning device that triggers preemption. *Malone*, *Boomsma*, and *Duncan*

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[2] *See* Eugene Gressman et al., *Supreme Court Practice* 253 (9th ed. 2007) (collecting cases granting certiorari "where the decision below is premised upon a prior Supreme Court opinion whose implications are in need of clarification"); *see also id.* at 297 (citing cases granting certiorari "to determine whether the state court has properly interpreted, applied, or extended a prior Supreme Court decision in a given situation").

undoubtedly would have come out differently under that standard.[3]

Not only does respondent's own position demonstrate the broad significance of the question presented in this case, but that position is confirmed by respondent's own *amici* in the court below. The Association of American Railroads ("AAR") asserted below that "the issues raised in this case will likely recur with great frequency." AAR *Amicus* Br. at 4, 12 (Tex. filed May 3, 2006). Similarly, *amicus* BNSF Railway Company contended that "[f]ederal preemption is the critical threshold issue for grade crossing suits in courts *throughout the United States*." BNSF *Amicus* Br. at 3 (Tex. filed Apr. 25, 2006) (emphasis added).[4] Notably, neither respondent nor its *amici* said anything about the 2004 Texas program when they sought to persuade the Texas Supreme Court to grant discretionary review of this case in 2006. Respondent's *amici* were correct then – this case is important.

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[3] Respondent asserts (at 28) that "most" existing crossbucks were replaced under this program, without providing additional detail. The materials on which respondent relies do not make clear, however, whether warning devices in fact were installed or existing devices were merely upgraded. In any event, the 2004 program does not diminish the significance of the question presented because, as is reflected in the cases from other courts on which petitioners rely, the proper scope of § 646.214(b) is an issue that arises in a variety of factual circumstances.

[4] Respondent attempts to explain away the statements of its *amici* by claiming (at 28) that this case was only important when respondent lost. But the representations of respondent's *amici* – which emphasized that the preemptive effect of improvements to railway crossings is a recurring issue – do not admit to such an outcome-determinative reading.

III. THE DECISION BELOW IS INCORRECT

Under *Easterwood* and *Shanklin*, state law is preempted only when "federal funds participate in the installation of warning devices," *Easterwood*, 507 U.S. at 671, because it is only then that the grade-crossing regulation, which refers to the "install[ation]" of a "warning device" at a crossing, 23 C.F.R. § 646.214(b)(4), "cover[s] the subject matter of" state law within the meaning of the Federal Railroad Safety Act's express preemption provision, 49 U.S.C. § 20106(a)(2). Under the regulation's plain language, no "warning device" was "installed" when retroreflective tape was applied to the existing crossbucks at the Front Street crossing because retroreflective tape is not a "warning device," 23 C.F.R. § 646.214(b)(4), and because the application of tape is not "installation," *Easterwood*, 507 U.S. at 671. *See* Pet. 21-26. The correctness of that analysis has been confirmed by the responsible federal agency's official interpretation of the relevant regulations. *See* Pet. 26-29; Pet. App. 116a.

The bulk of the brief in opposition (at 14-22) addresses the merits of the decision below. Those arguments ignore the worthiness of this case for review and can be addressed by this Court after certiorari is granted. In any event, respondent's contentions have no merit.

A. Respondent endorses (at 15-18) the Texas Supreme Court's conclusion that the federally funded "'enhancement . . . of an existing sign to meet FHWA requirements'" preempts state law. Opp. 15 (quoting Pet. App. 19a) (alteration in original). But this Court has made clear that, for state law to be preempted, the railroad must "establish that federal funds 'participate[d] in the *installation* of the [warning]

devices'" at the crossing where the accident occurred. *Easterwood*, 507 U.S. at 672 (alterations in original, emphasis added). Respondent's core theory appears to depend on the unsupported notion that "the application of the tape to a sign *effectively* 'installs' a new and upgraded sign" that therefore triggers preemption. Opp. 1; *see also* Opp. 16 (an upgrade "is effectively the 'installation' of a new warning device"). But, under the plain text, preemption exists only where there is a federally funded "install[ation]" of a warning device, 23 C.F.R. § 646.214(b)(4) – not the "effective[]" installation of one, whatever that would mean.[5]

B. Respondent spends only one page (at 18-19) defending the main merits holding of the decision below – that the application of the retroreflective tape was itself the installation of a warning device. *See* Pet. App. 16a. Respondent states baldly (at 18), as the court below did, that the tape is "clearly" a marking as that term is used in 23 C.F.R. § 646.204. As petitioners explained, however, that interpretation contradicts the regulations' text, as further interpreted by the Manual. *See* Pet. 23-26.[6]

[5] Realizing that its position lacks textual support, respondent resorts to absurd examples and mischaracterizations of petitioners' position. Respondent's claim (at 16) that, under petitioners' position, simply removing the crossbucks from the ground, sticking tape on them, and planting them back in the ground would support preemption is erroneous; petitioners take no such position.

[6] Respondent asserts (at 19) that the tape provides a different kind of warning than the crossbuck sign. But that does not make the tape a "marking" designed to warn motorists of the presence of a crossing as that term is used in the regulations or Manual. The Manual makes clear that, by "marking," the regu-

C. Respondent also argues that the Texas Supreme Court correctly disregarded the FHWA's official interpretation. Like the court below, respondent criticizes (at 19) the form of the official interpretation, in an effort to minimize its significance. But the FHWA's interpretation was not some off-the-cuff answer, as respondent attempts to portray it, but was rather an official interpretation promulgated under the agency's rules for requesting and issuing such interpretations. *See* Pet. 26-29. The decision below gave no recognition of that significance and failed to accord the agency charged with interpreting the regulations the deference it deserved.[7]

Respondent also relies (at 16-18) on an FHWA memorandum's statements that changes in the Manual may lead to changes in previously erected devices and that "then the crossing device will be the device that is treated as being in compliance with Part 646." Opp. App. 2a. But that memorandum does not purport to define "warning device" or to explain what is an "installation." And respondent's claim (at 17) that "[o]f course FHWA's approval authority is coextensive with pre-emption" is a circular misreading of *Easterwood* and *Shanklin*. Those cases establish that, "for projects in which federal

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lations contemplate items such as pavement markings on the road, not retroreflective tape. *See* Pet. 25.

[7] Contrary to respondent's claim (at 20), petitioners preserved their claim for deference in the court below. In fact, one of the *questions presented* by petitioners was framed in terms of whether the agency permissibly interpreted its own regulation. *See* Brief on the Merits of the Limmer Parties as Respondents at x (Tex. filed Jan. 31, 2007). Petitioners also argued for deference specifically throughout their papers below. *See id.* at 22; *see also* Response by the Limmer Parties to Petition for Review at iv, 7 (Tex. filed May 2, 2006).

funds participate in the *installation of warning devices*," federal approval of the devices is implied and preemption is warranted. *Easterwood*, 507 U.S. at 671. Nothing in *Easterwood* or *Shanklin* suggests that federal approval of some other activity that is not the installation of a warning device justifies preemption.

In any event, the FHWA memorandum that respondent cites provides no reason to deny review. If respondent were correct about the memorandum's meaning, the memorandum would conflict directly with the FHWA's official interpretation. Confusion regarding the agency's position will only foster increased inconsistency in judicial decision-making. Accordingly, the Court should consider calling for the views of the Solicitor General if it needs clarification on the agency's position before granting certiorari.

D. Finally, respondent erroneously argues (at 21-22) that the presumption against preemption is irrelevant to the interpretation of the grade-crossing regulations. The court below was charged with interpreting the scope of preemptive federal regulations, a classic case for application of the presumption against preemption. *See, e.g., Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715-16 (1985); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (presumption applies not only to the question whether Congress intended any preemption at all, but also to "questions concerning the *scope* of its intended invalidation of state law"); Constitutional and Administrative Law Scholars *Amicus* Br. 2-13.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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